

Lisa Swan Semansky
Hearing Officer
14 15th Street South
P.O. Box 3267
Great Falls, MT 59403-3267
Phone (406) 771-1584

BEFORE THE STATE SUPERINTENDENT OF PUBLIC INSTRUCTION
DENISE JUNEAU
STATE OF MONTANA

IN RE THE MATTER OF **

)
)
)
)
)
)
)

CAUSE NO. OSPI-2013-02

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

On or about October 3, 2013, Petitioner **, acting under the provisions of a Specific Power of Attorney, requested a due process hearing for [STUDENT] against Respondent ** School District No. * (School District). On October 16, 2013, the Office of Public Instruction appointed Hearing Officer Lisa Swan Semansky. The School District, without objection as to timeliness, filed a Motion to Dismiss on October 28, 2013. Again, by stipulation as to timeliness, [STUDENT] filed his Response to the Motion to Dismiss on November 25, 2013. This Hearing Officer denied the Motion to Dismiss by Order dated December 4, 2013. An initial hearing was scheduled for January 20-22, 2014, but at the request of the parties, was rescheduled to March 3 - 7, 2014. At the conclusion of the hearing [STUDENT] requested additional time to submit proposed Findings; this unopposed motion was granted as this Hearing Officer had reserved ruling on the School District's Objection to [STUDENT]'s expert testifying at the hearing. On April 22, 2014 this Hearing Officer issued her ruling, finding and admitting into evidence [STUDENT]'s expert and his testimony.

Throughout these proceedings, [STUDENT] has been represented by Andrée Larose, Morrison, Motl & Sherwood, PLLP. The School District was represented at the hearing by Patrick T. Fleming, Fleming & O'Leary PLLP. On March 3, 4, and 5, Hearing Officer Lisa Swan Semansky convened the Due Process Hearing at the conference room located at **, Montana.

[STUDENT] called the following witnesses: **, school psychologist, board certified behavior analyst and clinical psychologist who was offered and qualified as an expert witness (see Order dated April 22, 2014); ***, (Petitioner), attorney-in-fact for [STUDENT] since September 10, 2013; Mary L. Watson, LCPC, ** Special Education Director, ** School District No.*; and Ellen Condon, (Ms. Condon), Project Director, University of Montana Rural Institute on Disabilities.

The School District called the following witnesses: [STUDENT], ** Special Education Director, ** School District No.*; **, [Special Education teacher 1] and ** [Special Education Teacher 2], ** School District No. *1.

Petitioner's Exhibits 2, 3, 4, 5, 7, 8, 11b, 12, 13, 14, 15, 17, 22, 24, 29, 30, 31, 32, 33, 38, 39, 40, 41, 43, 45, 46, 47, 48, 49, 50, 51, 52, 53, 59, 60, 61, 62 were received into evidence without objection. Petitioner's Exhibits 57 and 58, individualized education programs (IEP) dated April 20, 2011 and May 6, 2011 were received into evidence with the stipulation of the parties that these IEPs were outside the statute of limitations for this proceeding. Petitioner's Exhibits 9, 11a, 16, 18, 19, 20a, 20b, 21, 23, 25, 26, 27, 28, 34, 37, 44 were admitted over objection of Respondent. Petitioner's Exhibit 54 was offered and not admitted as hearsay. Respondent's Exhibit B was admitted without objection. Respondent's Exhibit A was admitted over objection of Petitioner. All remaining proposed exhibits identified by the parties were not offered and admitted.

[STUDENT], through Petitioner, alleges that the School District violated [STUDENT]'s right to a free appropriate public education (FAPE) under the Individuals with Disabilities Improvement Act of 2004 (IDEA), 20 U.S.C. § 1400 et. seq. (2004). [STUDENT] contends that the School District failed to provide him with FAPE throughout the 2011-12 and 2012-13 school years by failing to provide special education and related services to meet [STUDENT]'s needs. Second, [STUDENT] contends that the School District failed to comply with procedural requirements of the IDEA. [STUDENT] withdrew his claim that the School District failed to provide educational services in the least restrictive environment.

The School District maintains that [STUDENT] was provided FAPE for the school years 2011-2012 and 2012-2013.

FINDING OF FACTS

1. [STUDENT] was born March 9, 1994. [STUDENT] resides with [Petitioner], his licensed foster care provider, at **. (Prehearing Order, Stipulated Facts, no. 1)
2. [STUDENT] was enrolled in ** School District No. * in September 2009 and was graduated from high school at the end of the 2012-2013 school year. At all times during which [STUDENT] was a student in ** School District No.*, he was identified as a student with a disability under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) and entitled to receive a free appropriate public education. (Prehearing Order, Stipulated Facts, no. 2).
3. [STUDENT] has not been declared incompetent or incapacitated, and he does not have a guardian. On March 22, 2012 [STUDENT] executed a durable power of attorney naming

- [SP] as his agent for educational matters (“DPOA1”). The power of attorney also named [PS] as co-agent. (Prehearing Order, Stipulated Facts, no. 4) On May 15, 2012, [STUDENT] executed two durable power of attorney documents in which he designated [SH] as his agent (“DPOA2”). (Prehearing Order, Stipulated Facts, no. 5)
4. On September 10, 2013, [STUDENT] executed a power of attorney in which he appointed [Petitioner] as his attorney-in-fact with the authority to pursue legal claims on his behalf, including claims under the state and federal education laws. (Exhibit 59)
 5. During the 2011-2012 and 2012-2013 school years, [STUDENT] attended the ** Treatment program operated by the School District as ** School. (Prehearing Order, Stipulated Facts, no. 7) ** is a School District day treatment program which includes School District curriculum. (TR. 377-380).
 6. [STUDENT] reached the age of majority on March 9, 2012. Prior to March 9, 2012, [STUDENT]’s biological mother held the parental rights afforded under IDEA for [STUDENT.] Pursuant to ARM 10.16.3502, when a student with disabilities reaches the age of 18, the parental rights under the IDEA transfer to the student in accordance with 34 CFR §§ 300.520 and 320(c). [STUDENT] has held all parental rights afforded under the IDEA since March 9, 2012.
 7. As is evident from IEPs that were signed by [STUDENT]’s biological mother on April 20, 2011 and May 6, 2011, [STUDENT] had a parent, advocates, friends, teachers, therapists, and a foster parent who were interested and involved in his educational issues and requirements. (Exhibits 57 and 58)
 8. A School District psychologist ** did a psycho-educational assessment of [STUDENT] in January and February, 2011 (Exhibits 2 and 3). [STUDENT]’s teacher and foster parent

assisted in providing data for portions of the assessment. [STUDENT]'s mother declined to provide data. According to Petitioner's expert, [school psychologist], these assessments revealed a severe discrepancy between [STUDENT]'s intellectual ability and academic achievement in the areas of reading, writing and math which, in his opinion, demonstrated that [STUDENT] had learning disabilities in reading, writing and math. (TR 66, 68-70, 73-76). Again, according to [school psychologist], this learning disability was never identified by the IEP team, during either the 2011-12 or 2012-13 school years. (Exhibit 3, TR 73, Exhibits 31, 33, 39, TR 82-83). Again according to [school psychologist], because of this failure to find learning disabilities, [STUDENT] was not identified as a student with specific learning disability when he was re-evaluated in October 2011. (Exhibit 7, TR 65, 75, 82-83). [School psychologist's] opinion regarding this possible learning disability is based wholly on his review of Exhibits 2, 7, 8, 31, 33, 39, and 40. He did not test [STUDENT], he did not interview [STUDENT]'s teachers or the foster parent of [STUDENT] at the time at the evaluation or parent of [STUDENT] (Tr. 45-55).

9. The School District evaluated [STUDENT] twice in 2011. The evaluation in March 2011 indicated that the IEP team (mother, [special ed director], advocate, and foster parent) qualified [STUDENT] as both autistic and emotionally disturbed. (Exhibit 3, *SD 1338). The Evaluation Report dated October 4, 2011 identified [STUDENT] as a student with a disability under the IDEA under the disability categories of Autism and Emotional Disturbance. (Pre-hearing Order, Stipulated Fact no. 8). The evaluation had input, of some form or another from [STUDENT}'s parent, [STUDENT], [special ed director], his special education instructors, ** and **, the school psychologist, [STUDENT]'s foster father,

petitioner, and others. (Exhibit 7). As part of this evaluation, a portion was denoted as a functional behavior assessment (FBA) provided by his special education instructors, ** and **. [Special Ed teacher 1] testified that she had received FBA training. (TR 464, 536-538), [Petitioner's school psychologist] , in his review of this evaluation, did not agree that there was a FBA done. He also found the evaluation to be incomplete and inadequate. (TR 66).

10. [Special ed teacher 1] testified that at the beginning of the 2011-12 school year, [STUDENT] engaged in verbally and physically aggressive behaviors that included stabbing [special ed teacher 1] with a pencil and punching another female staff member. [Special ed teacher 1] stopped teaching [STUDENT] as a result of his aggressive behaviors and [special ed teacher 2] was then assigned as [STUDENT]'s full-time teacher. (Tr. 467, 498). School District records reported that on September 16, 2011, [STUDENT] hit [special ed teacher 1] on the side of the head with his math folder. (Exhibit 5, at 1317). School District records reported that on September 29, 2011 [STUDENT] walked up to [special ed teacher 1] and jabbed her with 3 fingers in the side of the head. A notation is made in the record that [STUDENT]'s behaviors "are again beginning to escalate in a manner that is physically violent toward others." (Exhibit 5, at 1317).
11. [Special ed teacher 1] testified that she taught [STUDENT] math and English for the school year 2011-2012 for only a couple of months and then did not teach him anymore because of his aggression toward her. (Tr. 484, 498). During the short time she did teach him during the school year 2011-2012, she believed he progressed in his education. She based this upon her observation of him and the record of data, although she did not reference what data

to which she referred. (Tr. 483-484; Exhibit 51).

12. Pursuant to requests by [STUDENT]'s mother, School District set a date for an IEP meeting and notice of the meeting was sent to [STUDENT]'s mother and [Petitioner]. (Exhibit 12, TR 387-388).
13. The Individualized Education Program (IEP) team met October 4, 2011 and developed an annual IEP for [STUDENT] (Prehearing Order, Stipulated Facts, no. 9). (Exhibit 8). In addition to Petitioner **, [STUDENT]'s parent attended and signed this IEP. It was noted that the school psychologist ** gave a functional behavioral assessment (FBA) but the IEP noted that the School District would continue to pursue a certified applied behavioral analyst (ABA) for a FBA. (Exhibit 8, BSD 1438). The IEP indicated that [STUDENT]'s behaviors were not impeding his learning or the learning of others. (Exhibit 8, at 1432).
14. [STUDENT] had problematic behaviors in the school setting that were documented by his teachers. Documented behaviors included physical aggression, verbal aggressiveness, defiance, and hyperactivity. (Exhibits 2, 3, 4, 5, 7, 13, 22, 40, 48, 61; School District Exhibit B; Tr. 484-485, 498). [STUDENT], his mother, his foster father and his legal representatives brought their concerns about [STUDENT]'s behaviors in the school setting to the School District's attention and made requests for behavioral programming on numerous occasions beginning soon after the October 2011 IEP and continuing to early in 2013. (Exhibits 9, 11B, 18, 20B, 21, 23, 25, 27, 45).
15. The IEP team, including [STUDENT], [Petitioner] and [STUDENT]'s mother met on November 8, 2011 and it was determined that the team would meet again on December 5, 2011 to discuss a behavior plan for [STUDENT]. (Exhibit 14) On December 6, 2011 the IEP team met again, including [STUDENT]'s mother, [STUDENT], [special ed director],

[special ed teacher 1] and [special ed teacher 2]. However, the amended IEP was never put into effect because School District was unable to get [STUDENT]'s mother to sign amendments. (Tr. 387-388). Again, at these meetings there were discussions about the need for an ABA to do a FBA for [STUDENT] (Exhibit 14, BSD 1417).

16. The School District psychologist noted in February 2011 that [STUDENT]'s "social-emotional-behavioral evaluation indicated significant behavioral difficulties at home and school, and that he may qualify for services as a child with emotional disabilities due to clinically significant emotional problems that have been present for a long period of time and interfere with his success in school and his interpersonal relationships." (Exhibit 2, at 1327).
17. In about May 2011, [Petitioner] was licensed as [STUDENT]'s foster care provider and [STUDENT] was placed in foster care with [Petitioner]. (Prehearing Order, Stipulated Fact no. 3).
18. School District records show numerous other behavior incidents throughout the 2011-12 school year. (Exhibits 5, 13, 22 at 1403-1406).
19. [Special ed teacher 2] testified that he taught [STUDENT] math, English, science, history, life skills and some art classes. (Tr. 543). [Special ed teacher 2] testified that during the 2011-12 school year [STUDENT] made progress in math, science, history, and life skills, English and art. He based his opinion of these improvements on observation and the fact that [STUDENT] progressed in the curriculum used by the School District to teach the subjects. (Tr. 554-566). There was some documentation that supported [special education teacher 1]'s testimony concerning [STUDENT]'s improvements in the class work. (Tr. 585-586, Exhibit 51).

20. Despite documentation of [STUDENT]'s problem behaviors prior to and throughout the 2011-12 school year, and despite numerous requests for behavioral evaluations and programming, the School District did not document in [STUDENT]'s IEPs that his behavior impeded learning until the 2012 annual IEP meeting and formulation of his IEP, dated October 3, 2012. (Compare Exhibit 8, at 1432, Exhibit 14, at 1409, Exhibit 22, at 1392, with Exhibit 33, at 1980).
21. [Special ed teacher 1] further testified that she and [STUDENT]'s other teacher, [special ed teacher 2] prepared a behavior intervention program (BIP) that was in place during the 2011-2012 school year. (Tr. 496-497, Exhibit 22, BSD 1401-1402). She further testified that she and [special ed teacher 2] prepared and implemented a BIP for [STUDENT] for school year 2012-2013 (Tr. 527-529, Exhibit 33, BSD 1987-1988). [Special ed teacher 2] testified that he presented the BIPs to the IEP team and that the IEP team approved them. (Tr. 569-572).
22. Pursuant to 34 CFR §300.324(b) School District should have convened an IEP meeting to consider the homebound services request by [STUDENT.] At the time the application was provided [Petitioner], [STUDENT] was still enrolled. The School District dropped [STUDENT] from its enrollment on April 2, 2012, in accordance with their policy, because [STUDENT] had missed more than 10 consecutive days. (Prehearing Order, Stipulated Facts, no. 10).
23. Pursuant to 34 CFR §300.303(b)(1) [STUDENT], once he reached majority, could request a reevaluation which he did when he requested a functional behavior assessment (FBA) and other services and assessments on April 2, 2012, April 17, 2012, and May 15, 2012. (Exhibit 18, 20B, 27). However, during this time, [STUDENT] was not in school very much.

(Exhibit 42)

24. There is no documented evidence that the School District developed and implemented a BIP for [STUDENT] prior to April 20, 2012. One teacher testified that the School District always had BIPs for [STUDENT], but did not describe the plan in any manner and the School District failed to present any documentary evidence of such a plan. (Tr. 497). It was not clear when the April 20, 2012 BIP was presented to the IEP team. (Tr. 436-437).
25. On April 24, 2012, School District records show that [STUDENT] tried to stab a paraprofessional with a pencil and flipped over a desk as he walked out of class. (Exhibit 5, at 994).
26. The IEP team met on April 24, 2012 and School District would not consider requests by [STUDENT] and his DPOA because of the School District's concerns regarding his competency. (Exhibit 22, BSD 1399, Exhibit 28). Pursuant to 34 CFR §300.520 Montana is to have procedures in place for appointing someone, if the parent is not available, to represent the educational needs of a student with a disability if that student can be determined to not have the ability to provide informed consent with respect to his/her educational needs. Montana has the surrogate parent procedure as outlined in §§27-7-461-27-7-463 MCA. Accordingly, School District requested the County Attorney request the court appoint a surrogate parent for [STUDENT]. School District nominated [surrogate parent]. (Tr. 388-392, 453-459; Exhibit 62).
27. [STUDENT] through his DPOA requested homebound services on or about April 30, 2012 for the duration of the school year. (Exhibit 23). The School District responded with a denial because it would constitute a change in educational setting. (Exhibit 24). However, the School District had provided a homebound application to [Petitioner] on March 20, 2012

and followed up with an inquiry as to it being completed on March 29, 2012. (Exhibit 17).

28. There is a letter to the School District dated May 15, 2012 wherein [STUDENT] and his DPOA requested an independent evaluation (IEE) including a psychological evaluation, behavioral assessment and transitional assessment. (Exhibit 27). Since [STUDENT] had reached the age of majority, he (and his duly authorized agent) had the right to request an IEE at the School District's expense since they disagreed with the School District's evaluation by [school psychologist]. 34 CFR §300.502(b). At the time of the request it appears [STUDENT] was not enrolled as a student at School District.
29. [Special ed teacher 1] testified that [STUDENT] participated in transitional activities in the spring of 2012 as part of the transitional services provided to him pursuant to his IEP. (Tr. 485-486; Exhibit 47).
30. The IEP team met on September 9, 2012 (Exhibit 30) and developed an annual IEP for [STUDENT] on October 3, 2012. (Prehearing Order, Stipulated Facts, no. 12). This IEP was not signed although repeated requests were sent asking for signature by the School District. [Special ed director] testified that notice was sent to [STUDENT] indicating that the IEP would be implemented in 15 days if no rejection was made of it in accordance with ARM 10.16.3505(2)(c). [Special ed director] did not submit a copy of this notice at hearing. (Tr. 427-430).
31. Pursuant to discussions at the IEP team meeting diagnostic tests in reading and math were done by [STUDENT] on September 18, 2012. (Exhibit 31, Tr. 576-577)
32. The diagnostic tests were referred to in [STUDENT]'s annual IEP which is dated October 3, 2012 (Exhibit 33) and indicate his reading is at 3.2 and his math is at 5.2. There was improvement in his math from his prior annual IEP. (Exhibit 8, BSD 1436). It is not

documented by such tests whether [STUDENT]'s reading had improved. (Id.)

[STUDENT]'s October 3, 2012 IEP indicates that his behavior impedes his learning and others. This IEP addresses transitional services that directly relate to community experiences and future possible employment. (Exhibit 33, BSD 1982).

33. The IEP team met again on December 3, 2012 to finalize [STUDENT]'s academic schedule for the 2012-2013 school year. This meeting amended [STUDENT]'s IEP. A speech and language evaluation was done and the report is attached to the IEP. (Exhibit 39).
34. School District attempted to find a certified ABA to do a FBA for [STUDENT] and could not retain such a person in Montana. (Tr. 393-395) The School District then requested that **, a School District employee who has a master's degree in special education and training in functional behavior, assess [STUDENT] for functional behaviors. She did and provided a report to the IEP team on or about December 18, 2012. (Exhibit 40, Tr. 394-396, 574)
35. In February 2013, The School District sought and obtained appointment of [a legal representative], as the legal representative to give consent to [STUDENT]'s educational program. [Special ed director] acknowledged that, at the time the School District sought the appointment of [legal representative], [petitioner] was [STUDENT]'s foster father, and [STUDENT] was living with [petitioner]. She further testified that [petitioner] was actively involved in [STUDENT]'s education, always available for meetings, and a strong advocate for [STUDENT]. (Tr. 388, 455-460). This hearing officer takes judicial notice of the Montana State Supreme Court's decision regarding the surrogate parent appointment and incorporates by reference its holding as binding for this hearing. *In re the matter of [STUDENT]*, 2014 MT 74 (2014).
36. The IEP team met again on February 27, 2013 wherein it was determined that [STUDENT]

would stay at [day treatment] full time and that further discussions between [STUDENT] and his surrogate parent would happen regarding his transitional plan. (Exhibit 46, *SD 1971-1972).

37. [STUDENT] was re-evaluated by **, a School District psychologist and the report completed on April 18, 2013. (Exhibit 48). In the clinical impressions [school psychologist] notes that [STUDENT] has not seemed to make advances academically since previous evaluation. (Exhibit 48, BSD 1677)
38. The IEP team met on April 18, 2013 and amended [STUDENT]'s IEP. It was agreed that compensatory education for [STUDENT] would not occur so that he could graduate in June, 2013. This amended IEP was signed by [STUDENT] and [legal representative]. (Exhibit 50, *SD 1936).
39. [Special ed teacher 2] testified regarding the life skills class he taught [STUDENT] during the 2011-2013 school years and how they related to the transitional services provided by the School District to [STUDENT] (Tr. 577-578).
40. [STUDENT]'s therapist, **, LCPC, testified that based on her experience counseling [STUDENT] and reviewing behavioral incidents with him, [STUDENT]'s problem behaviors were more pronounced in the school setting than in other settings. (Tr. 318-322). The School District did not ask her input or attempt to coordinate with her regarding [STUDENT]'s social/emotional/behavioral issues, although she made herself available by attending numerous IEP meetings for [STUDENT.] (Tr. 322-324). She further testified that she did not affirmatively volunteer her insights to the School District. (Tr. 332)
41. [Petitioner] testified that it seemed to him that [STUDENT]'s problem behaviors were more

pronounced in the school setting than they were in his home, and that he was able to redirect or intervene successfully at home. (Tr. 255-266, 278-280).

42. [Petitioner's school psychologist] testified that he reviewed the School District's entire educational file for [STUDENT] and that based upon this examination, he opined that [STUDENT]'s behaviors impeded his learning throughout the 2011-12 and 2012-13 school years. (Tr. 122-130). However, [school psychologist]'s testimony was refuted by [STUDENT]'s teachers and [special ed director] who interacted with [STUDENT] regularly. [Petitioner's school psychologist] acknowledged that he did not interview these teachers, did not spend any time with [STUDENT]; did not formally evaluate [STUDENT] or observe him in an educational setting (Tr. 45-55); therefore, this hearing officer found the testimony of the teachers about [STUDENT]'s academic progress and implementation of their behavior plans with [STUDENT] to be more persuasive and gave their testimony more weight. See, *Sebastian M. V. King Philip Regional School District*, 59 IDELR 61 (1st Cir. 2012).
43. IDEA requires transition services to be in effect when the child turns 16, or at a younger age if determined appropriate by the IEP Team, and updated annually, thereafter. 34 C.F.R. § 300.320(a). The IEP must include appropriate measurable post-secondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and the transition services (including courses of study) needed to assist the child in reaching these goals. *Id.*
44. The 4/20/12 BIP was not based on an FBA, nor does it identify the functionally equivalent replacement behavior to teach [STUDENT.] [Special ed teacher 2] testified vaguely that the 4/20/12 BIP was based in part on "any of the FBAs or evaluations that are

done,” however he did not point to any particular FBA. The School District selected certain strategies from a pre-existing list without any analysis of [STUDENT]’s preferences to identify positive reinforcers for appropriate behavior that would be effective for [STUDENT.] There is no evidence in the record of data collected either to develop or monitor implementation of the plan. (Tr. 141-146). There is no analysis of data to ascertain what interventions could be effective and what replacement behaviors should be taught. The author of this BIP gave vague testimony and did not explain any linkages between data and the BIP, the basis for the interventions chosen or the functions of [STUDENT]’s problem behaviors. (Tr. 584-585).

45. The BIP developed October 3, 2012 was developed by the same teacher. He testified that he based the 10/3/12 BIP on an FBA from the previous year or “whatever we had available at the time.” (Tr. 585; Exhibit 33, at 1987-1988). However, [special ed teacher 1] and [special ed teacher 2] testified that they did prepare and implement a behavior plan which is attached to Exhibit 33. Although perhaps not the best behavior plan, it was prepared and implemented by the two teachers who knew and had contact with [STUDENT] the most. Therefore, it was specifically addressed to meet the behaviors he displayed at times. (Exhibit 33; Tr. 464-500, 524-533, 539-579)
46. No School District personnel with behavioral expertise testified in defense of the School District’s behavioral programming although [special ed teacher 1] did testify that she had functional behavioral training.
47. Evidence indicates [STUDENT]’s behaviors continued to be an issue following implementation of the 10/3/12 BIP as well. On February 6, 2013, the ** County Attorney sought involuntary commitment of [STUDENT.] (Exhibit 61).

48. The 10/4/11 IEP lacked appropriate goals to meet [STUDENT]'s needs in several area of educational need. In the area of academics, the evaluations that were conducted showed that [STUDENT] was achieving significantly below his intellectual ability in seven academic areas, yet there are only three academic goals and those three goals do not address the seven areas of academic deficits. For example, [STUDENT]'s reading comprehension is years below grade level, yet there is no reading comprehension goal. The only reading goal in the IEP [STUDENT] will use "phonemic awareness" to decode a passage. However, phonemic awareness is not a decoding strategy; it is a cognitive skill. Moreover, [STUDENT]'s phonemic awareness skill was not tested by the School District, so it is not even known if he is competent or deficient in that cognitive skill. (Tr. 161-164). There were no goals addressing [STUDENT]'s needs in the area of communication and social pragmatics, yet deficits in those areas are the hallmark of [STUDENT]'s autism diagnosis. There were no goals addressing [STUDENT]'s social skills deficits, yet that identified as a significant area of need in evaluations preceding the development of this IEP. There were no goals for independent living skills, also known as daily living or adaptive skills, another area of need for [STUDENT]. There was only one goal in the social/emotional/behavioral realm and that was aimed at teaching [STUDENT] to follow directions. (Tr. 164-169; Exhibit 8).
49. The 10/4/11 IEP failed to address [STUDENT]'s transitional needs. There were no age-appropriate transition assessments conducted. Without transition assessments, there cannot be adequate measurable post-secondary goals, and without post-secondary goals, the course of study and transition services needed to prepare the student for achieving those goals cannot be determined. To the extent the IEP identified post- secondary goals, they were

not goals for [STUDENT] to achieve, but rather statements postponing the setting up of goals or identifying goals for outside adult providers to achieve. (Exhibit 8, at 1434). The failure to identify the educational program or training in which [STUDENT] hopes to participate after high school means there was no guideline for identifying and providing transition services and a course of study in the IEP that would help [STUDENT] be prepared for post-secondary education or training. The idea of setting post-secondary education, training, employment and independent living allows the IEP team to adequately plan for, and provide the supports and services [STUDENT] needed for an effective transition from high school to adult life. 20 U.S.C. § 1401(34)(A); 1414(d); (Exhibit 8, at 1434).

50. The 10/3/12 IEP addressed [STUDENT]'s transitional needs. Although not referenced in the IEP, there is evidence that a career interest survey was conducted. (Exhibit 32). Moreover, the IEP team did utilize the career interest survey in a meaningful manner, as the team did discuss it and incorporated its results in developing a post-secondary employment goal. (Tr. 577-578; 418-421, Exhibit 33, at 1981).
51. In summary, the IEPs developed for [STUDENT] during the 2011-12 school year did not include essential goals and evidence-based special education services, did not include appropriate transition services and, overall, were not designed to meet [STUDENT]'s unique needs.
52. The evidence establishes that [STUDENT] needs special education instruction and related services delivered in a particular manner due to his particular disability. Because of his autism and his trauma history, and resulting social, communicative and behavioral deficits, [STUDENT] needs specialized instruction, real-life experiences and interactions with a high

level of supervision and constant coaching and feedback to develop pro-social behaviors that will enable him to live and potentially work safely and successfully. Further, his behavioral programming must include appropriate treatment for his anger and frustration behaviors - modifications that specifically target the variables related to [STUDENT]'s disability that contribute to his behaviors. (Tr. 506-507; Exhibit 49).

53. A student who fails to receive appropriate services during any time in which he is entitled to them may be awarded compensation in the form of additional services through an award of compensatory education.
54. [Petitioner's school psychologist] proposed 1) a comprehensive evaluation of [STUDENT] in the areas of academic, social, behavioral, emotional, speech and language/communication needs, to include psycho-educational assessments for ascertaining [STUDENT]'s specific learning disabilities; 2) age appropriate transition assessments in the four areas of training, education, employment and independent living skills; 3) a functional behavior assessment by a Board Certified Behavior Analyst or other qualified professional with education and training in behavior analysis; 4) the equivalent of two school years of education services to address academic and transition service needs, to include programing for [STUDENT]'s academic, social, behavioral, emotional, speech and language/communication, and independent living needs and to include integrated employment experiences to develop his job-related skills in natural settings outside of the school environment; 5) 30 to 60 hours of academic remediation in the areas of severe discrepancy - reading, writing and math; 6) assistance of a BCBA or other qualified professional to conduct the FBA then develop a behavioral intervention program and train those working with [STUDENT] to implement the program, with ongoing monitoring and consultation for approximately 30 hours of professional time.

55. Ellen Condon, Project Director for the Rural Institute on Disabilities, University of Montana, testified regarding the consultation and support the Rural Institute provides to schools in conducting transition assessments and developing transition services. She testified that the Rural Institute does individualized assessments in four areas: training, education, employment and independent living skills. In addition, the Rural Institute assists schools in preparing students for integrated employment (employment in a community setting) that takes into account the student's individual strengths, preferences and interests. According to Ms. Condon jobs are designed and developed based on the student's individual strengths and needs. Ms. Condon testified that the Rural Institute would be willing to conduct transition assessments for [STUDENT] and also to provide technical assistance to the School District in developing a vocational profile and placing [STUDENT] in community-based job experiences. (Tr. 504-521).
56. In reviewing the testimony and evidence presented, it is reasonable to award [STUDENT] compensatory education to compensate him for the special education and related services that were not provided to him during the school year 2011-2012.
57. In further review of the testimony and evidence presented it is evident that despite the difficulties with regard to [STUDENT] reaching majority but in need of assistance with regard to his educational needs and goals, the IEPs, evaluations, assessments and BIPs that were implemented in the 2012-2013 school year were appropriate and afforded [STUDENT] with educational benefit. Some advancements were made by [STUDENT] during that school year and he did receive transitional services designed to assist him once he graduated. [STUDENT] made progress toward the goals set forth in his 2012-2013 IEPs and he received services necessary to permit him to benefit from the instruction he received; therefore he received FAPE

during that school year. The fact that [STUDENT], through his DPOA and foster father disagreed with the conclusions of the IEP team, some of the content of the IEPs, or the eligibility category (although that was not disagreed with until this complaint was filed), does not mean that the 10/2012 IEP and amendments were not appropriately individualized for [STUDENT].

58. [Petitioner] testified and indicated in writing that [STUDENT] needs transitional services, and in-home behavioral training, and possibly some academic instruction in drafting or art at the regular high school but not more classroom or academic hours as such. (Exhibit 49, Tr. 289, 293-296)

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the Conclusions of Law of this Hearing Officer are as follows:

1. The Findings of Fact that also constitute Conclusions of Law are incorporated in the Conclusions of Law by reference. Likewise, Conclusions of Law that also constitute Findings of Fact are incorporated in the Findings of Fact by reference.
2. This case arises under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA), 20 U.S.C. §§ 1400 et. seq. The primary purpose of the IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education which emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; . . .” 20 U.S.C. §

1400(d)(1)(A) (2004).

3. The IDEA has been implemented on the federal level by the adoption of regulations found at 34 C.F.R. Part 300.
4. Although the IDEA generally requires the provision of FAPE to students aged 3 through 21 (up to age 22), the IDEA defers to State law or practice with regard to the provision of FAPE to children aged 18 through 21.
5. The maximum age of eligibility under the IDEA for special education is 22, as 21 year olds are included within the range of ages to which FAPE applies. However, for students ages 18 through 21, Montana law or practice determines the maximum age of eligibility for special education and related services under federal and state laws. 20 U.S.C. § 1412(a)(1)(B) (1997, 2004).
6. Under Montana law, a child is entitled to attend school “when the child is 6 years of age or older on or before September 10 of the year in which the child is to enroll but is not yet 19 years of age.” Mont. Code Ann. § 20-5-101(1)(a). A child with a disability, who is 6 years of age or older and under the age 19, is entitled to receive special education services. Mont. Code Ann. § 20-7-411(2).
7. Montana law allows the trustees of a school district the discretion to admit a child who is 19 years of age or older if there are exceptional circumstances. Mont. Code Ann. § 20-5-101(3). School district trustees also are given discretion to establish and maintain a special education program for a child with a disability who is 19 years of age or older and under age 22 years of age. Mont. Code Ann. § 20-7-411(4).
8. The IDEA also mandates that FAPE be available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive. 20 U.S.C. §1412(a)(1)(2004).

9. The term “free appropriate public education” or FAPE means that a disabled student is entitled to have an individual educational program (IEP) that is tailored to his particular needs. An IEP is a written statement of the special education, related services, and accommodations the school will provide, which is prepared at a meeting attended by a qualified representative of the school district, a teacher, the child’s parents or guardians, and when appropriate, the child himself. 20 U.S.C. §1401(20)(2004). *Burlington Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359, 368 (1985); see also, 20 U.S.C. §§ 1411-1420; 34 CFR § 300.17. The IEP is a comprehensive statement of the educational needs of a student and the specially designed instruction and related services that will be employed to meet those needs.
10. The U.S. Supreme Court has defined what constitutes FAPE in *Board of Education of the Hendrick-Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). The Supreme Court set forth a two-fold inquiry. The first inquiry is whether the educational agency has complied with the procedures required under the IDEA. This requires a determination of whether the school district has created an IEP that conforms with the requirements of 20 U.S.C. § 1414. The second inquiry is whether the IEP developed through such procedures is reasonably calculated to meet the child’s unique needs and enable the student to receive educational benefit. *Rowley*, at 181, 206-07. The IEP must provide personalized instruction and sufficient support services to enable the child to benefit from the instruction. *Id.* at 189, 194.
11. The FAPE tailored by the IEP team and described in an IEP, however, need not be the best possible one, nor one that will maximize the child’s educational potential; rather, it need only be an education that is specifically designed to meet the child’s unique needs,

supported by services that will permit him “to benefit” from the instruction. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 188-89 (1982). In other words, the IDEA guarantees only a “basic floor of opportunity” for every disabled child, consisting of “specialized instruction and related services which are individually designed to provide educational benefit.” *Id.* at 201. Still, the educational benefit which the IDEA contemplates and to which an IEP must be geared cannot be “a mere modicum or de minimis;” rather, the IEP must be “likely to produce progress, not regression or trivial educational advancement.” *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F.*, 118 F.3d 245, 248. In short, the educational benefit that an IEP is designed to achieve must be “meaningful.” *Id.*

12. 34 C.F.R. §300.8(c)(1)(ii) provides that [A]utism does not apply if a child’s educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (c)(4) of this section. See, ARM §10.16.3011(5). Without dispute by the parties, [STUDENT] has autism. It is his primary diagnosis. The fact that [STUDENT]’s IEPs reference that he had the disability of emotional disturbance does not automatically mean he was denied FAPE. See, *R.C. v. Keller Independent School District*, 113 LRP 31472 (US DC No. Texas 2013). Despite this reference in [STUDENT]’s IEPs, his 2012-2013 IEPs were sufficiently individualized to meet his unique needs and provide him educational benefit and such “labeling” did not deny him FAPE.
13. The term “educational benefit” is broadly defined and includes a student’s social, emotional and behavioral needs. *Seattle Sch. Dist.*, 82 F.3d at 1500 (9th Cir. 1996); *see also*, H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.
14. The IDEA embodies an elaborate system of procedural safeguards, the importance of which “cannot be gainsaid.” *Rowley* at 205. Procedural compliance is essential to ensuring that

every eligible child receives a FAPE. *Amanda J. v. Clark County School*, 267 F.3d 877, 891 (9th Cir. 2001).

15. Procedural flaws in the IEP process do not always amount to a denial of a FAPE. *L.m. v. Capistrano Unified School Dist.*, 556 F.3d 900, 909 (2009), citing *Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1483 (9th Cir. 1992).
16. The IDEA requires procedural safeguards that protect the rights of the child whenever the parents of the child are not known, or the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents. The assignment of a surrogate is to occur not more than 30 days after there is a determination that the child needs a surrogate. 20 U.S.C. § 1415(b)(2)(A)-(B); 34 CFS 300.519(a)-(b); Mont Code Ann. § 20-7-461.
17. Montana law is specific in its requirement that, within 10 days of determining the child is in need of a surrogate parent, a school district or institution must file the necessary petition with the Youth Court nominating and seeking appointment of an appropriate surrogate parent. Mont. Code Ann. § 20-7-461(1); Admin. R. Mont. §10.16.3504.
18. The failure to timely initiate the appointment of the proper party as legal representative is a procedural violation that impeded [petitioner]'s right of meaningful parental participation in the IEP process. However, this is a procedural violation of the IEP process that did not substantially result in a denial of FAPE to [STUDENT.]
19. Because [petitioner] is the proper legal representative for [STUDENT] and should have been designated as such initially, he has had the authority to pursue this due process hearing on [STUDENT]'s behalf or in conjunction with [STUDENT.]
20. The IEP is a written statement for each child with a disability that is developed, reviewed

and revised in a meeting in accordance with 34 CR §§ 300.320 through 300.324. The IEP must include, among other components: 1) a statement of the child's present levels of academic achievement and functional performance; 2) a statement of measurable annual goals designed to meet the child's needs; 3) a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child; 4) a statement of the program modifications or supports for school personnel; and, in the case of a child whose behavior impedes learning, a consideration of the use of positive behavioral interventions and strategies, and other strategies, to address that behavior. 34 C.F.R. §§ 300.320(a) and 300.324(a)(2); *R.P. v. Alamo Heights Indep. Sch. Dist.*, 703 F.3d 801, 813 (5th Cir. 2012).

21. To determine whether the School District offered [STUDENT] a FAPE, the analysis must focus on the adequacy of the School District's proposed program. If the School District's program was designed to address [STUDENT]'s unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then the School District provided FAPE, even if [STUDENT]'s parent preferred another program. *Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314; *Student v. Manhattan Beach Unified School District* (2007) Cal. Ofc. Admin. Hrngs, Case No. 2006010204. 1314; *Student v. Manhattan Beach Unified School District* (2007) Cal. Ofc. Admin. Hrngs. Case No. 2006010204.
22. A public agency has an affirmative duty to ensure an appropriate, comprehensive evaluation is conducted. Failure to do so is denial of FAPE. *See, e.g., Hellgate*, 541 F.3d at 1209-10; *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1523 (9th Cir. 1994).
23. On the basis of review of existing data, and input from the child's parents, the IEP team

must identify what additional data, if any, are needed to determine the educational needs of the child, the present levels of academic achievement and related developmental needs of the child, and whether any additions or modifications to the special education and related services are needed. 34 C.F.R. 300.305(a)(2)(i)-(iv). It is the School District's responsibility to administer any assessments and evaluation measures needed to produce the additional data the team must consider. 20 U.S.C. §1414(c)(1); 34 CFR 300.305(c). Those assessments must be administered by trained and knowledgeable personnel. 34 C.F.R. 300.304(c)(1)(iv)-(v).

24. Among other requirements for conducting a reevaluation, the School District must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information; the assessments and other evaluation materials used must be tailored to assess specific areas of educational need; and the School District may not use any single measure or assessment as the sole criterion for determining an appropriate educational program. 34 C.F.R. 300.304(b)-(c); 20 U.S.C. § 1414(b)(2)-(3). Assessment tools and strategies must "provide relevant information that directly assists persons in determining the educational needs of the child." 34 C.F.R. 300.304(c)(7).
25. The IDEA requires an evaluation to be "sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified." 34 C.F.R. §300.304(c)(6). Additionally, the child must be "assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities." 34 C.F.R. § 300.305(c)(4).

26. The 2011 evaluation that was used in forming the October 2011 IEP provided sufficient comprehensiveness in the social, emotional and behavioral realm. The psycho-educational assessment conducted in 2011 included SSIS and BASC-2 rating scales that were completed. As a result, there was sufficient evaluative information to accurately assess [STUDENT]'s social and behavioral functioning for purposes of developing an appropriate IEP.
27. Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include "appropriate post-secondary goals and the transition services needed to assist the child in reaching those goals." 34 C.F.R. § 300.320(b)(2). Transition services must be designed within a results-oriented process that is focused on improving the academic and functional achievement of the student to enable them to move from school to post-school activities. 20 U.S.C. § 1401(34); 34 C.F.R. § 300.43(a)(1).
28. The specific services to be offered in a transition plan include: (1) instruction, (2) related services, (3) community experiences, (4) development of employment and other post-school adult living objectives, and (5) if appropriate, acquisition of daily living skills and a functional vocational evaluation. 34 C.F.R. § 300.43(a)(2).
29. Transition services means a "coordinated set of activities" that must be designed "within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement school to post school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation." 20 U.S.C. § 1401(34)(A); 34

C.F.R. § 300.43(a)(1) (emphasis added). These transition services must be “based on the individual child’s needs, taking into account the child’s strengths, preferences, and interests.”

20 U.S.C. §1401(34)(B); 34 C.F.R. § 300.43(a)(2).

30. The IEPs in effect during the 2011-12 school year failed to meet the requirements of the IDEA to provide transition services. The School District’s failure to conduct age appropriate transition assessments violated the essential first step in the development of transition services, rendering it impossible for the IEP team to develop appropriate measurable post-secondary goals and to identify the transition services needed for [STUDENT] to meet those goals. In addition, there were no appropriate measurable post-secondary goals in [STUDENT]’s IEPs during the 2011-12 year. Without appropriate measurable post-secondary goals, there could not be adequate transition services to assist the student in meeting such goals.
31. In addition to not being based upon appropriate and required age appropriate transitional assessments and linked to appropriate measurable post-secondary goals, the transition services identified in [STUDENT]’s 2011 IEP’s failed to meet his needs. There was no functional vocational assessment that determined [STUDENT]’s strengths in the area of employment.
32. Subsequent evidence of progress or lack of progress may be a relevant factor in determining the appropriateness of the IEP at the time it was made, but it is not outcome determinative. There is no reliable evidence that [STUDENT] made academic progress during his 2011-2012 school year in *** public schools. The objective test results show no academic progress by [STUDENT] between November 2011 and April 2013. This evidence supports the conclusion that [STUDENT]’s 2011-2012 IEPs were not reasonably calculated to

provide him meaningful educational benefit.

33. Behavior intervention programs must be written with sufficient specificity and must address the student's behaviors and possible consequences with consideration of the student's individual needs. *Kingsport City Sch. Sys. v. J.R.*, 2008 U.S. Dist. LEXIS 78704, 51 IDELR 77 (E.D. Tenn. 2008) (finding a denial of FAPE where the BIP was not appropriate for behavior management needs of the student); *New York City Dep't of Educ.*, 49 IDELR 270 (SEA NY 2008) (holding that without appropriate behavior interventions in place, the child could not receive a meaningful educational benefit in a district program).
34. The purpose of a functional behavior assessment is to dissect the behavior so as to plan the most effective method of eliminating it. *In re Student with a Disability*, 49 IDELR 147 (SEA IN 2008) (noting that it was not enough to report that the behavior occurred and describe it and that data collection and analysis are the very essence of a FBA) *Id.*
35. The requirements for an evaluation, 34 C.F.R. 300.304 through 300.311 apply when a School District conducts an FBA to assess the educational and behavioral needs of a particular child. *Letter to Anonymous*, 59 IDELR 14, 112 LRP 23125 (OSEP 4/9/12).
36. The School District did not conduct a valid FBA for [STUDENT] during the 2011-12 school year, despite the labeling of such with the IEP. The documents the School District contends was a FBA did not meet the evaluation requirements set forth in 34 C.F.R. 300.304 and 300.305. The FBA was not sufficiently comprehensive or specific enough to identify [STUDENT]'s behavioral needs and directly assist the team in developing an appropriate behavior intervention plan and supports.
37. If the behavior of a student impedes his learning or the learning of other children, the IEP team must consider the use of positive behavioral interventions, supports and other

strategies to address that behavior. 20 U.S.C. 1414(d)(3)(B)(i); 34 C.F.R. 300.324(a)(2)(i) and (a)(3)(i).

38. The IDEA's emphasis on the use of scientifically based instruction and interventions applies to the behavioral programming provided to students with disabilities as well as to the professional development of staff. 34 C.F.R. 300.320(a)(4); 34 C.F.R. 300.226(b)(1); 34 C.F.R. 300.35.
39. An IEP that does not address appropriately behavior that impedes a student's learning denies the student a FAPE. *See e.g., Neosho R. v. Sch. Dist. V. Clark*, 315 F.3d 1022, 1028 (8th Cir. 2003); *Lauren P. v. Wissahickon Sch. Dist.*, 310 Fed App'x 552, 554-55 (3rd Cir. 2009) (concluding that defendant's "failure to address [the child's] behavioral problems in a systematic and consistent way denied [her] a FAPE."); *Penn Trafford Sch. Dist. v. C.F.*, 2006 U.S. Dist. LEXIS 13581, 2006 WL 840334, at *8 (W.D. Pa. 2006) (finding the failure to "provide a behavior management plan" through the IEP "a serious omission"); *G.D. v. Wissahickon Sch. Dist.*, 832 F. Supp. 2d 455, 466-467 (E.D. Pa. 2011).
40. The School District's finding on the October 4, 2011 IEP that [STUDENT]'s behavior did not impede learning was directly contrary to the School District's documentation of [STUDENT]'s disruptive behaviors, to the testimony of teaching personnel and to the School District's own evaluation results. Because the School District disregarded the documented fact that [STUDENT]'s behaviors impeded his learning, the IEP team did not document that they considered positive behavioral supports and did not develop a behavior intervention plan at the annual IEP meeting October 4, 2011, in violation of 34 C.F.R. 300.320(a)(2)(i) and (a)(3)(i). The behavior plan was not presented until April 20, 2012 to the team. (Exhibit 22). As a result, [STUDENT] was deprived of educational opportunities and his right to

FAPE was impeded. Questions and Answers on Discipline Procedures, Question E-2, 52 IDELR 231 (USDE, Office of Special Education and Rehabilitative Services 2009).

41. [STUDENT] had significant behavioral issues in the school setting through the 2011-2012 and 2012-13 school years that negatively impacted his learning. The School District did not develop appropriate, individualized behavior intervention plans or otherwise provide appropriate programming to meet [STUDENT]'s behavioral needs until the school year was nearly complete, in April 2012. This is a substantial impediment to his ability to gain an educational benefit during that time and resulted in a denial of FAPE for [STUDENT.] However, based upon the evidence and testimony presented in this case, this hearing officer concludes that during the school year 2012-2013 School District made a "good faith effort" to help [STUDENT] achieve his educational goals in his IEP with the use of the FBA and BIPs in place. See, *M.M. v. District 1 Lancaster County School*, 702 F.3d 479 (8th Cir. 2012).
42. A court must determine the appropriateness of the IEP at the time it is made. *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). At the time [STUDENT]'s October 2012 IEP was developed, staff sought sufficient information to develop the required components of the IEP. Information was provided by [STUDENT], staff initiated classroom observations, as well as discussions with advocates, [Petitioner], [special ed director], a re-evaluation was submitted and all were considered to determine his current level of functioning, [STUDENT] was interviewed to determine his post-secondary goals, so that a transition plan for [STUDENT] could be developed for [STUDENT.]
43. The Ninth Circuit has held that an educational plan must be judged according to information available at the time the plan was implemented. "Actions of the school systems cannot. . . be judged exclusively in hindsight. . . . An individualized education program ("IEP")

is a snapshot, not a retrospective. In striving for ‘appropriateness,’ an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.” Adams, 195 F.3d at 149-50, quoting *Fuhrmann v. E. Hannover Bd. of Educ.*, 993 F.2d 1031, 1041 (3d Cir. 1993).

44. Students with disabilities who do not satisfactorily complete full-unit courses in order to graduate with a “regular” diploma nevertheless may be awarded a diploma upon successful completion of their IEP goals.
45. The entitlement to special education “does not apply to students who have graduated but have not been awarded a regular high school diploma.” 34 C.F.R. §300.122(a)(3)(ii). The regulations also note that graduation constitutes a change in placement for a student on an IEP. 34 C.F.R. § 300.122(a)(3)(iii). OSEP has explained that school districts should re-evaluate the student’s IEP prior to graduation in order to assess whether the student has met all of the requirements necessary for requirements necessary for receipt of diploma. 22 IDELR 456; *Letter to Richards*, 17 EHLR 288 (OSEP, Response to Inquiry, 1990). With respect to a decision concerning graduation, particularly when students have successfully completed their IEPs but will not receive a diploma, parents are entitled to the due process protections afforded under the IDEA, namely, the right to prior written notice and the right to an impartial due process hearing. 34 C.F.R. § 300.503-300.514; 22 IDELR 456; 16 EHLR 307.
46. A student’s statutory entitlement to FAPE continues until the student earns and is awarded a regular diploma or until the student reaches the maximum age of eligibility under State law or practice, whichever occurs first. 20 U.S.C. §§ 1412(a)(1)(B), 1414(c)(5)(B)(I) (2004); 34 C.F.R. § 300.102(a)(3).

47. Under the IDEA, the burden of proof in an administrative hearing challenging the appropriateness of an Individualized Education Program is on the party seeking relief, which in this case is [STUDENT.] *Schaffer v. Weast*, 126 S. Ct. 528, 531 (2005).
48. Based upon the evidence, both documentary and testimony, School District repeatedly attempted to provide [STUDENT] with a FAPE in compliance with the IDEA in the school year 2012-2013 by developing individualized IEPs and BIPs; conducting multiple evaluations of [STUDENT]; promptly and carefully reviewing the results of the evaluations and using those results to further individualize [STUDENT]'s IEPs; communicating with [STUDENT] and his DPOAs and foster father and teachers regarding [STUDENT]'s specific needs and ways to help [STUDENT]; scheduling and conducting IEP teams meetings frequently; considering their own as well as private evaluations of [STUDENT]; and ultimately making educational recommendations in compliance with the IDEA and regulations. Clearly there were disagreements between school staff and [STUDENT]'s DPOAs and foster father, but considering the facts in the record and laws at issue as set forth herein, this hearing officer concludes that the IEP developed for [STUDENT] for the 2012-2013 school year was adequate, and School District provided [STUDENT] with a FAPE in accordance with the requirements of the IDEA.
49. The IDEA provides that a hearing officer or a court “shall grant such relief as the court determines appropriate.” 20 U.S.C. § 1415(i)(2)(C)(iii).
50. Compensatory education can be awarded as an equitable remedy when a school district or state agency has failed to provide a free appropriate public education (“FAPE”). As the Ninth Circuit has held, compensatory education is “an equitable remedy, part of the court’s resources in crafting ‘appropriate relief.’” *Parents of Student W. v. Puyallup Sch. Dist. No.*

3, 31 F.3d 1489, 1497 (9th Cir. 1994); see also, *Park v. Anaheim Union High*, 464 F.3d 1025, 1033 (2006) (award of compensatory education services made); *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1485 (9th Cir. 1992) (reimbursement of privately obtained educational services ordered).

51. As previously held by this Hearing Officer, a court or hearing officer need not reach the question of substantive compliance if the Court finds procedural inadequacies that result in the loss of educational opportunity or that caused a deprivation of educational benefits, *N.B. v. Hellgate Elementary*, 541 F.3d 1202, 1212-13 (9th Cir. 2008). Compensatory education services may be provided for the procedural denial of FAPE, to compensate for the possible loss of educational opportunity. *J.T. v. Dept. of Educ., State of Hawaii*, 2012 U.S. Dist. LEXIS 76115, *78-*79 (D.C. Hawaii 2012).
52. In this case, compensatory education services are necessary not only to compensate for procedural violations resulting in losses of educational opportunities, but also for a substantive failure to provide FAPE. As this Hearing Officer has concluded, the October 2011 IEP and proposed amendments developed by the School District failed to provide special education and related services designed to meet [STUDENT]'s unique needs. Compensatory education services as described herein are necessary and appropriate to remedy the harm caused to [STUDENT] as a result of both significant procedural and substantive denials of FAPE for that school year.
53. Once the need for compensatory education is established, the Hearing officer is responsible for crafting an appropriate compensatory education award. It is not the responsibility of either party to determine the appropriate relief. It is an improper delegation of the Hearing Officer's authority to permit the IEP team or the parties to determine the scope of the

compensatory education award. *Meza v. Bd. of Educ. of the Portales Municipal Sch.* (No. CIV 10-0963 JB/WPL), 2011 U.S. Dist. LEXIS 31061, *36-44 (D.C. New Mex. 2011) (Held hearing officer could not delegate authority to determine amount and type of compensatory education award to IEP team and/or consultant team); *Reid*, 401 F.3d at 526-27 (D.C. Circuit held hearing officer may not authorize IEP team to reduce or discontinue compensatory education award); see also, *Bd. of Educ. of Fayette Cnty., Ky. v. L.M.*, 478 F.3d 307 (6th Cir. 2007) (Sixth Circuit held the hearing officer may not delegate to a student's team the power to reduce or terminate a compensatory award).

54. The IDEA does not allow due process hearings to be conducted by an employee of the State educational agency or the local educational agency involved in the education or care of the child. 20 U.S.C. § 1415(f)(3). An IEP team, in contrast, is statutorily required to include a representative of the local educational agency. 20 U.S.C. §1414(d)(1)(B)(iv). Therefore, a delegation of power to the IEP team to decide the amount or scope of the compensatory-education award would, in effect, result in the IEP team exercising the hearing officer's powers. *Reid*, 401 F.3d at 526; *L.M.*, 478 F.3d 317-318.
55. The Ninth Circuit holds that courts and hearing officers have discretion on how to craft the relief and "[t]here is no obligation to provide a day-for-day compensation for time missed." *Park*, 464 F.3d at 1033 quoting *Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 1496 (9th Cir. 1994). Rather, "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Parents of W.*, 31 F.3d at 1497.
56. This flexible case-specific approach to compensatory education awards has been adopted in several circuits, including the Ninth, Eleventh, and D.C. Circuits. *Parents of*

Student W., supra; Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275 (11th Cir. 2008); *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005). This more flexible approach will produce different results in different cases depending on the child's needs. Some students may benefit from intensive programs of a shorter duration. Others may need extended programs exceeding hour-for-hour replacement of time spent without FAPE. *Reid*, 401 F.3d at 524.

57. Compensatory awards must accomplish more than the educational benefit a typical IEP provides - they must compensate for prior FAPE denials. *Draper*, 518 F.3d at 1289; *Reid*, 401 F.3d at 524-525.
58. A court or hearing officer enjoys "broad discretion" in fashioning appropriate relief for the denial of FAPE. *Florence County Sch. Dist. Four v. Carter ex. rel. Carter*, 510 U.S. 7, 16 (1993).
59. Courts and hearing officers have been creative in fashioning the amount and type of compensatory education services to award. *R.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1126 (9th Cir. 2011). For example, the Ninth Circuit affirmed an order for additional training to enable the student's teachers to be better able to meet his particular needs, finding the evidence was speculative that the student would benefit from additional direct services. *Park*, 464 F.3d at 1034. *In Ferren C. v. Sch. Dist. of Philadelphia*, 612 F.3d 712 (3rd Cir. 2010), the school district established a trust fund in excess of \$200,000 to provide compensatory education for 3 years past the student's 21st birthday.
60. The fact that [STUDENT] may become ineligible for IDEA services within the next two years does not preclude him from obtaining prospective compensatory education services. A student who has been deprived of FAPE has a right to compensatory education,

regardless of his eligibility for current or future services under the IDEA, as a number of circuit courts have held. *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 189-99 (1st Cir. 1993); *Burr v. Ambach*, 863 F.2d at 1078 (2nd Cir. 1988), vacated and remanded sub nom. *Sobol v. Burr*, 492 U.S. 902 (1989), reaff'd on reconsideration, *Burr v. Sobol*, 888 F.2d 258 (2nd Cir. 1989); *Lester H. v. Gihoool*, 916 F.2d 865, 873 (3rd Cir. 1990); *Jefferson County Bd. of Ed. v. Breen*, 853 F.2d 853, 857 (11th Cir. 1986); *see also, Zobrest v. Catalina Foothills School District*, 125 L. Ed. 2d 1, 8, n.3, 113 S. Ct. 2462, 246, n.3 (1993) (Supreme Court held a student's claim presented a live controversy, notwithstanding the fact that he had graduated from high school and was no longer eligible for services under the IDEA.)

61. This Hearing Officer has heard all the evidence, weighed it thoroughly, and has determined that [STUDENT] was not provided FAPE by the School District for the 2011-12 school year.
62. Having determined that the School District failed to provide FAPE for [STUDENT] for the school year 2011-2012, [STUDENT] is entitled to appropriate relief. The IDEA provides that a hearing officer or a court "shall grant such relief as the court determines appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii).
63. [STUDENT] is entitled to compensatory education services to consist of appropriate evaluations to aid in the assessment process for transitional services. Transition services are of great importance in the IDEA. *Carrie I. ex rel. Greg I. v. Dept. of Educ, Hawaii*, 869 F. Supp. 2d 1225, 1244 (D. Hawaii 2012); 20 U.S.C. § 1400(c)(14); *See Also, Forest Grove School Dist. v. Student*, 114 LRP 26109 (2014). In order to make these transitional services meaningful, [STUDENT]'s behaviors need to be considered

and programs implemented to assist in making the transitional services work.

64. For compensatory education services, [STUDENT] is entitled to: 1) an opportunity to attend classes in an academic setting that would assist or benefit him for his adult life for 30 hours or less; 2) age appropriate transition assessments in the required areas of training, education, employment and independent living skills, to be conducted by the Rural Institute on Disabilities in coordination with the School District; 3) the assistance of a board certified behavior analyst (BCBA) or other qualified professional to conduct the FBA and then develop a behavioral intervention program and train those working with [STUDENT] to implement the program, with ongoing monitoring and consultation for approximately 30 hours of professional time.
65. [STUDENT] is entitled to education services as outlined in the foregoing paragraph for a period of time of 155 days which are based on the number of days for the 2011-12 school year. These educational services must be designed to meet [STUDENT]'s needs in the following areas: academic, social, behavioral, independent living and transition. Transition services should be based on the transition assessment that may be conducted by the Rural Institute and developed in coordination with, and utilizing technical assistance from, the Rural Institute. The team must develop measurable post-secondary goals taking into account [STUDENT]'s strengths, preferences and interests, then develop a course of study and transition services based on those post-secondary goals. In the particular area of employment, the School District shall coordinate with appropriate vocational providers, including Rural Institute, to develop a vocational profile and set up integrated employment experiences for [STUDENT] to develop his job related skills in natural settings outside of the school environment.

66. This Hearing Officer's decision identifies the scope and type of services to be provided, but does not attempt to formulate the precise goals, services or scientifically based instruction that must be provided. A properly formulated IEP team shall convene to design the precise educational program to comply with the parameters stated herein.
67. Because of [STUDENT]'s age and the potential behavioral issues, the parties are encouraged to provide as much services and instruction in community settings as feasible. Nothing in this Order should be interpreted as a requirement that [STUDENT] receive instruction in a particular school building, nor should it be interpreted as requiring School District personnel to conduct evaluations or assessments.
68. The consulting professionals who are engaged by School District to implement the compensatory related services awarded to [STUDENT] should collaborate with each other so that the services are individualized, comprehensive and coordinated.

ORDER

Based upon the foregoing, IT IS HEREBY ORDERED:

1. Within 30 days of the date of this Order, the School District shall arrange for the following compensatory educational services at School District expense: 1) an opportunity to attend classes in an academic setting that would assist or benefit him for his adult life for 30 hours or less; 2) age appropriate transition assessments in the required areas of training, education, employment and independent living skills, to be conducted by the Rural Institute on Disabilities in coordination with the School District. These assessments shall be completed as soon as feasible, but not later than 90 days from the date of this Order; 3) a functional behavior assessment, to be conducted by a BCBA or other qualified

professional to be selected by [STUDENT.]

2. Within 30 days of the completion of the functional behavior assessment, the School District shall convene a properly formulated IEP team for the purpose of developing an IEP for [STUDENT] that includes the scope and types of services to be provided, as described above and summarized as follows:

- a) Special education and related services and supplementary aids and services for a period of 155 days to address [STUDENT]'s needs in the following areas:
- b) Transition services that are based on the transition assessments conducted by the Rural Institute and developed in coordination with, and utilizing technical assistance from, the Rural Institute. The team must also develop measurable post-secondary goals taking into account [STUDENT]'s strengths, preferences and interests, then develop a course of study and transition services based on those post-secondary goals. In the particular area of employment, the School District shall coordinate with the Rural Institute and other appropriate vocational providers to develop a vocational profile and set up integrated employment experiences for [STUDENT] to develop his job related skills in natural settings outside of the school environment.
- c) The School District shall retain at least 30 hours of professional services of a BCBA or other qualified professional to conduct the FBA, develop a behavioral intervention program and train those working with [STUDENT] in the home or whatever settings he receives services, and to implement the program, with ongoing monitoring and consultation.

3. Nothing in this Order precludes the IEP team from agreeing to utilize providers other than

School District personnel for implementation of the services required herein or from providing instruction in settings other than the school setting. Because of [STUDENT]'s age and the potential behavioral issues that may arise in returning him to a school setting, the parties are encouraged to provide as much services and instruction in community settings as feasible.

4. Throughout the time period these compensatory educational services are provided [STUDENT] is entitled to all the procedural and substantive protections of the IDEA.

DATED effective this 10th day of June, 2014.

/s/ Lisa Swan Semansky
Hearing Officer

CERTIFICATE OF SERVICE

I certify, under penalty of perjury, that a true and correct copy of the foregoing FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER duly served upon the respective attorneys for each of the parties entitled to service by emailing and depositing a copy in the United States mail at Great falls, Montana, enclosed in a sealed envelope with first class postage prepaid thereon and addressed as follows:

Morrison, Sherwood, Wilson & Deola, PLLP
ATTN: Andree Larose alarose@mmslawgroup.com
P.O. Box 557
401 North Last Chance Gulch
Helena, MT 59601

Patrick T. Fleming folaw@flemingandlearylaw.com
Fleming & O'Leary PLLP
510 E. Park Street, Suite 200
P.O. Box 527
Butte, MT 59703

Linda Brandon-Kjos (original) lbrandon@mt.gov
Office of Public Instruction

Legal Division
P.O. Box 202501
Helena, MT 59620-2501

DATED this 11th day of June, 2014.

/s/ Lisa Swan Semansky
Hearing Officer